

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

HOLLY WEINSTEIN, PEGGY  
RODRIGUEZ, ANDREA DIMARIO, and  
CRYSTAL YOUNGER, individually and on  
behalf of all others similarly situated,

Plaintiffs,

v.

REXALL SUNDOWN, INC.,  
NATURESMART, LLC, and THE  
BOUNTIFUL COMPANY f/k/a THE  
NATURE’S BOUNTY CO.,

Defendants.

Case No.: 2:21-cv-5378-JS-ARL

**DEFENDANTS’ NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT**

**TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

Please take notice that Defendants Rexall Sundown, Inc., NatureSmart, LLC, and The Bountiful Company (collectively, “Defendants”) hereby move this Court, before the Honorable Joanna Seybert, in Courtroom 1030, Alfonse M. D’Amato Federal Building, 100 Federal Plaza, Central Islip, New York, 11722, for an order dismissing Plaintiffs’ Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1).

The Complaint alleges the labels of several of Defendants’ children’s flavored Multivitamin Gummy Products (“the Products”) are false and misleading under the common law and consumer protection statutes of several states and violate express and implied warranties. Following a pre-motion conference before this Court on February 11, 2022 (*see* ECF No. 26), Defendants make this Motion based on the following grounds:

1. Plaintiffs fail to state a claim upon which relief can be granted because the term upon which Plaintiffs primarily base their false advertising claims—“complete”—is neither untruthful or misleading, but rather is a subjective term incapable of being proven true or false. It is therefore non-actionable puffery. Moreover, the Products’ label is neither false nor misleading because it accurately discloses the ingredients in the Products. Thus, Plaintiffs’ claims for (a) violations of consumer protection statutes (Counts I; VIII, IX, and X), (b) intentional misrepresentation (Count II), (c) negligent misrepresentation (Count III), (d) common law fraud (Count IV), and (e) violations of express warranties (Count V) should be dismissed under Rule 12(b)(6).
2. Plaintiffs’ fraud claims also fail because they violate Rule 9(b) by impermissibly “lumping” all three defendants (Rexall Sundown, Inc., NatureSmart, LLC, and The Bountiful Company) together without identifying which defendant is allegedly responsible for the statement(s) at issue.
3. Plaintiffs’ breach of implied warranties claim fails because Plaintiffs neither plausibly allege the Products are unmerchantable nor that they communicated their particular purpose to Defendants.
4. Plaintiffs’ unjust enrichment claim is deficient because it hinges exclusively on Plaintiffs’ core theories of fraud and consumer deception (which are untenable) and because they cannot pursue equitable relief while also alleging the existence of a valid express warranty.
5. Finally, Plaintiffs lack standing to seek injunctive relief because they have not plausibly alleged any threat of imminent future harm.

This Motion is based upon this Notice, the accompanying Memorandum of Law, the

complete record in this action, and other matters and arguments that may come before this Court, including those raised in connection with reply briefing and oral argument.

Pursuant to Rule III.F of this Court's individual Rules of Practice, Defendants hereby request oral argument on this Motion.

Dated: March 14, 2022

Respectfully submitted,

By: /s/ William A. Delgado  
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REXALL SUNDOWN, INC.,  
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BOUNTIFUL COMPANY

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the Electronic Service List for this Case.

/s/ William A. Delgado

William A. Delgado